



Dear reader,

I am pleased to present the twelfth issue of Eurojust News. This issue focuses on the European Arrest Warrant (EAW), the most prominent mutual recognition tool. The EAW is celebrating 10 years of existence, so now is a good time to consider its strengths and weaknesses, especially as the call for reform within one year has been sounded by the European Parliament.

Jan Van Gaever, a Deputy Prosecutor General in Brussels, formally introduces this newsletter with a discussion of the issues surrounding the EAW, including suggestions for its improvement and a possible enhanced role for Eurojust. Following Mr Van Gaever's introduction, we move on to Eurojust's activities in the area, case examples highlighting the role of Eurojust and the work of Eurojust's Judicial Cooperation Instruments Team.

The Spring Conference of the European Criminal Bar Association, held in Warsaw on 25-26 April, was entitled Legal aid – privilege for criminals or essential for fair proceedings?. A forum such as this provides an opportunity for practitioners and experts, including Eurojust, to exchange information on topics that are relevant for the EU criminal justice area.

Eurojust hosted a strategic seminar in June, entitled The European Arrest Warrant: Which way forward?, in which leading figures in Europe's legislative sphere gave presentations that provided valuable discussion points and background, and held workshops on a range of highly relevant topics. **Professor Anne Weyembergh** gave the keynote speech at the seminar, and we were fortunate that she could spare the time to provide Eurojust News with an interview.

Baroness Sarah Ludford, a former Liberal Democrat MEP from the UK, gave a keynote speech at the meeting of the Consultative Forum on the future of the European Arrest Warrant. Baroness Ludford was also kind enough to provide an enlightening interview for this issue of Eurojust News. **Professor Val-samis Mitsilegas** of University College London provides his perspective of the first ten years of the EAW. **Judge Lars Bay Larsen** of the Court of Justice of the European Union (ECJ) shares his thoughts on the development of the EAW, the protection of fundamental human rights, and cases before the ECJ.

If you have any comments concerning this issue of Eurojust News, please contact our Press & PR Service at info@eurojust.europa.eu.

Michèle Coninx, President of Eurojust



European Arrest Warrant

Introduction

Jan Van Gaever is Deputy Prosecutor General in Brussels, with responsibility for, among other things, international cooperation in criminal matters. Mr Van Gaever is the author of various works on criminal law, criminal procedural law and international cooperation in criminal matters (including a book on the European Arrest Warrant in practice, *Het Europees aan-*

houdingsbevel in de praktijk) and is guest professor for Belgian judicial trainees and for national and international magistrates. Mr Van Gaever is also a member of the editorial board of the *Tijdschrift voor Stafrecht* (Journal of Criminal Law).

Mr Van Gaever kindly agreed to provide an introduction to the EAW for *Eurojust News*.

IN THIS ISSUE

- 1 Introduction
- 4 History of the EAW
- 5 Eurojust and cooperation partners
- 10 Practical and legal issues
- 10 ECBA Spring Conference
- 12 Interviews with Baroness Ludford, Professor Weyembergh, Professor Mitsilegas and Judge Bay Larsen



EUROJUST

Maanweg 174
NL - 2516 AB The Hague

Tel: +31 70 412 5000
Fax: +31 70 412 5005
info@eurojust.europa.eu
www.eurojust.europa.eu

Mutual recognition is the cornerstone of the EAW Framework Decision. Mutual recognition implies mutual trust



Mr Jan Van Gaever

'We have been celebrating the 10th anniversary of the entry into force of the Council Framework Decision on the European Arrest Warrant. This might be a good time to evaluate what we have and what we lack when considering where we want to go. During this decade, numerous assessments have been carried out, especially at EU level, safeguarding the advantages of the new system of surrender and resolving dysfunctions or trying to (e.g. the different level of implementation in the Member States). According to the Commission, consolidation is the key word for the coming years. Nevertheless, as already indicated by, *inter alia*, the Commission, there is still room for improvement. This is certainly not an easy task, especially when reflecting on a potential EU legislative initiative. One should be very careful because of the real risk of regression in the event of reopening negotiations. The challenge is therefore to come to a common understanding, perhaps in the form of a Memorandum of Understanding signed by the competent authorities of the Member States and the Commission, which can be implemented at national level or can lead to the use of a common manual with binding guidelines. An alternative might be a horizontal instrument on mutual recognition, although this option requires further reflection.

With regard to the Nordic Arrest Warrant (NAW), we cannot exclude the possibility that this system might inspire and influence further developments of the EAW system, although one should keep in mind that the Commission Proposal for the EAW Framework Decision, entailing a system much closer to the NAW, did not survive the debate stage. Comparison and cross-pollination between the EAW and the NAW is difficult and should be carefully assessed. The level of approximation of legal norms and mutual trust between the Nordic States is more developed than within the European Union. To quote Professor Anne Weyembergh, "*When it comes to the abolition of the specialty principle the question arises as to whether the attained level of trust in the EU area is mature enough for such a move*" (even after 10 years of application of the EAW).

Instead of seeing Europe's cultural diversity as an obstacle to harmonisation, we should use this to our advantage. If the Commission (or Eurojust) could lead the way to the creation of a trilingual European database on jurisprudence related in a first stage to the most important topics of the EAW system, we could benefit from the experience of other countries in trying to resolve the most criticised issues, such as the use of grounds for refusal, the use of legal remedies or fundamental rights. This might also allow a better mechanism for advising on how to interpret dispositions of the EAW Framework Decision and would lead to a better understanding in the field on how to cooperate with foreign judicial authorities.

Mutual recognition is the cornerstone of the EAW Framework Decision. Mutual recognition implies mutual trust. It's well known that not all executing authorities apply the same level of mutual trust. Belgian judicial authorities have repeatedly emphasized that this concept needs to remain rock solid, leaving no margin for interpretation, and as such does not allow courts to

consider the merits of the accusation. It might be convenient to call to mind an old but still valid rule applicable in extradition proceedings, namely the Non-Inquiry Rule. To paraphrase an American judge, the Non-Inquiry Rule is the well-established rule that extradition proceedings are not to be converted into a dress rehearsal trial.

Belgian law prohibits surrender in the event of a possible infringement of fundamental rights. Although such infringement is quite often invoked by defence counsel in order to have surrender refused, these allegations are seldom accepted, especially because many of the arguments invoked bear no relation whatsoever to fundamental rights. According to the established jurisprudence of the Belgian Supreme Court, courts evaluate indisputably if there is a real and personal risk of infringement of the requested person's fundamental rights and assess if the factual background allows the assumption of respect for these rights in the issuing State to be refuted. The courts do not have to assess the level of respect for fundamental rights in the issuing State as they themselves are not competent to supervise the entire foreign procedure from the moment of initiating the proceedings to the execution of the sentence. They only have to ensure that there are no serious reasons for believing that the execution of the EAW would lead to such an infringement. In general, Belgian jurisprudence has since 2004 evolved to a (further) restriction on the application of grounds for refusal, taking into consideration that surrender is the rule and refusal the exception.

Before launching an EAW, a check should be performed on trial readiness and to verify if the transfer of the execution of the sentence or the transfer of proceedings to the Member State of nationality or residence of the requested person would be more expedient. When talking about choosing between an EAW or MLA request, one should not be blind to the fact that it may take about 45 days to have a

person surrendered and that it may take between six months and two years to have an MLA request for the interrogation of the same person executed and returned, with no guarantees regarding the quality of the interrogation. We will see what the future will bring once the European Investigation Order is operational.

To tackle what seem to be disproportionate EAWs, judicial authorities should be given the freedom to put the execution of the EAW and the subsequent arrest of the requested person temporarily on hold, in order to have sufficient time at our disposal to consult the issuing authority.

Last, but not least, the added value of Eurojust (also) in the application of the EAW cannot be emphasized enough. There are numerous cases that would not have led to the same result without the intervention of Eurojust. An expansion of Eurojust's role is conceivable, for example, when

tackling the situation of multiple EAW requests, requiring a coherent interpretation of Article 16 of the EAW Framework Decision and perhaps leading to a revision of this article, providing Eurojust with a stronger role in such cases. However, one has to take into account the Commission's point of view not to recognize Eurojust's decisions as binding, despite the possibility offered by Article 85 of the Treaty on the Functioning of the European Union (TFEU).

My final remark is that it would be really fantastic for practitioners to be able to consult a database on the concrete legal application of the EAW in all Member States (including jurisprudence). Eurojust could, if wanted, play a key role in this matter, collecting and analysing information provided by the National Desks (or by the European Judicial Network), complementing the restricted scope of the evaluation reports issued by the Commission.' ■

In 2013

221

EAW cases registered at Eurojust

29

Poland made the most requests

37

Italy received the most requests

Source: Eurojust Annual Report 2013



© shutterstock

History of the EAW

From extradition procedure to European Arrest Warrant

Recognising the need for a faster and simpler method of arrest and surrender of requested persons, the need to avoid lengthy extradition procedures in the Member States, and a guarantee of fundamental rights for the accused, the Framework Decision on the European Arrest Warrant (EAW Framework Decision) was approved in 2002 and entered into force on 1 January 2004 (Council Framework Decision 2002/584/JHA, amended in 2009 by Council Framework Decision 2009/299/JHA).

This instrument, the first to be adopted on the basis of the principle of mutual recognition, is founded on trust and direct contact among the judicial authorities of the Member States. Surrender is facilitated by several factors, among which are: (a) the requested Member State must execute the warrant without judging the substance of the accusation; (b) strict time limits on execution of the EAW avoid the possibility of lengthy pre-trial detention periods; and (c) double criminality as a ground for refusal is limited.

Implementation

Member States were asked by the European Commission to bring their national legislation in line with the EAW Framework Decision, were counselled to limit the number of warrants issued for minor offences, and were therefore advised to apply the principle of proportionality.

The EAW Framework Decision has been implemented in all Member States. The first eight Member States to implement the EAW Framework Decision were Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden and the UK. A further sixteen Member States had implemented the EAW Framework Decision by 1 November 2004. Italy followed in April 2005. Bulgaria and Romania implemented

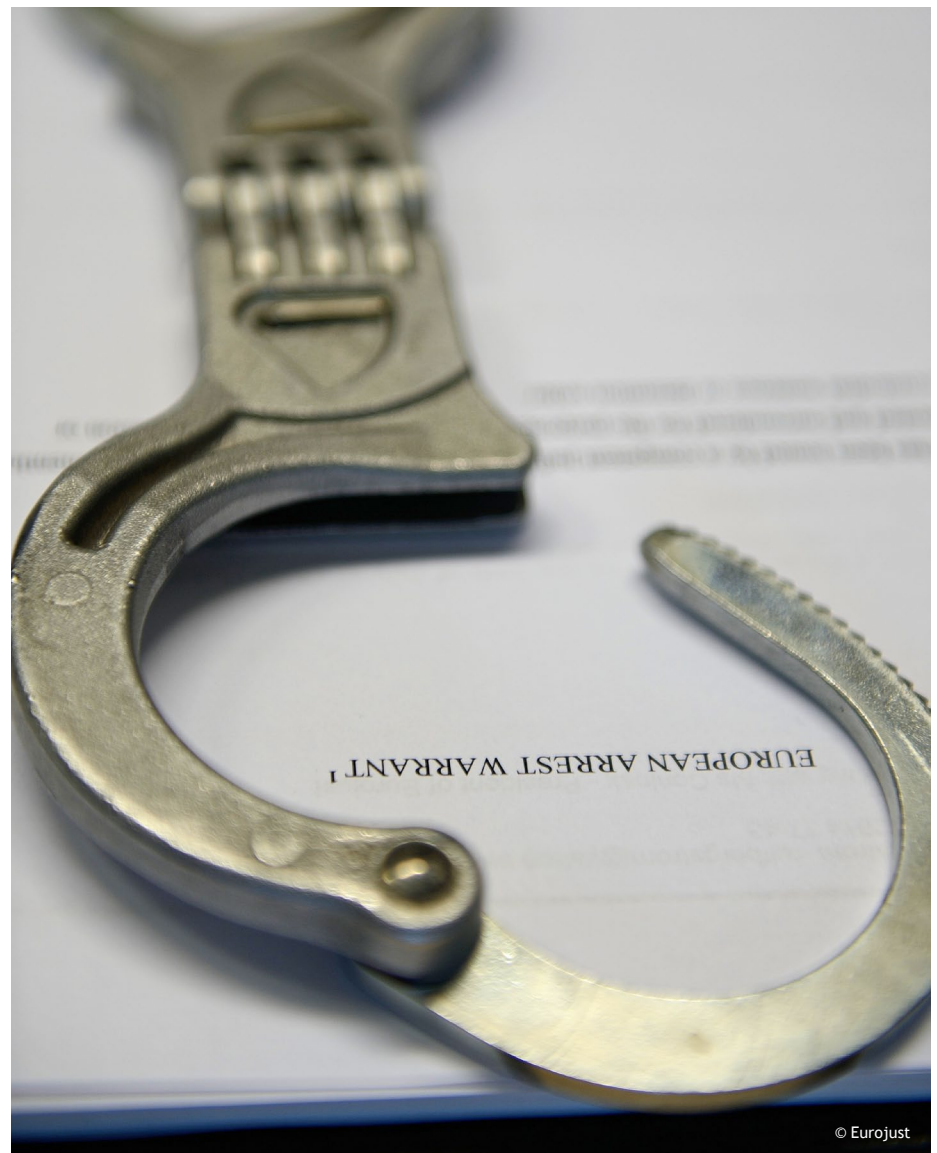
the EAW Framework Decision upon their accession in 2007. Croatia implemented the EAW Framework Decision in January 2014.

Success

The EAW has fundamentally changed the Area of Freedom, Security and Justice. But is the EAW a success? Has it met its goal of accelerating surrender procedures? All of our interviewees in this newsletter would agree, with some qualifications and room for improvement, that the EAW has for the most part succeeded, as further confirmed by the Commission's Implementation Reports

on the EAW Framework Decision (2006, 2007 and 2011), concerning implementation status in the Member States; the final Report on the 4th Round of Mutual Evaluations (2009), dedicated to the EAW Framework Decision; the 2011 follow-up to the evaluation reports; and the European Parliament's Resolution on the review of the EAW (2014).

Nonetheless, on 27 February 2014, the European Parliament adopted a Resolution, with recommendations to the Commission, on the review of the EAW. For further information on this topic, please see the interview with Baroness Ludford. ■



Eurojust and cooperation partners

The role of Eurojust

The EAW Framework Decision and Eurojust have been in existence for the same period of time. Eurojust has played a key role in improving cooperation in criminal matters between Member States, and a significant aspect of this role has been facilitating the execution of EAWs. The success of Eurojust's work in the field of the EAW can easily be measured by the number of cases involving EAWs that it has registered between 2007 and 2013: 1 730 cases. The success of the EAW can be seen in the number issued by all Member States in 2013 alone: 15 827.

The story begins with Article 3(1)(b) of Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (Eurojust Decision), which states:

...the objectives of Eurojust shall be:

(b) to improve cooperation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests.

Article 16(2) of the EAW Framework Decision states 'The executing judicial authority may seek the advice of Eurojust (1) when making the choice referred to in paragraph 1' (this choice refers to deciding which EAWs will be executed in the event of multiple requests), and Article 17(7) states:

Where in exceptional circumstances a Member State cannot observe the time limits provided for in this Article, it shall inform Eurojust, giving the reasons for the delay. In addition, a Member State which has experienced repeated delays on the part of another Member State in the execution of European arrest warrants shall inform the Council with a view to evaluating the implementation of this Framework Decision at Member State level.

Member States request the assistance of Eurojust in accordance with Article 16 of the EAW Framework Decision. In this context, Eurojust applies its own *2011 Guidelines for internal proceedings on the provision of Eurojust's opinion in case of competing European Arrest Warrants*. To gain an insight into how Eurojust works in this regard, see *Guidelines for deciding which jurisdiction should prosecute* in the [Eurojust AR2003](#), pages 60-66.

Further insight into the role of Eurojust in EAW cases is found in Annex II to the Eurojust AR2004, entitled *The legal and practical implications of the Framework Decision on the European Arrest Warrant*. The annex contains sections on identification of obstacles, guidelines for deciding on competing EAWs, and breach of time limits in EAW cases. See [Eurojust AR2004](#), pages 80-88.

In cases involving competing and concurrent EAWs, Eurojust can provide advice leading to a solution regarding transfer of proceedings. The ultimate decision will be made by the judicial authorities of the executing Member State. To avoid a decision overly favourable to one Member State, Eurojust can organise a coordination meeting as a communication platform to get the national authorities to talk to each other, or can consult the involved Member States, e.g. if two EAWs have been issued by two Member States for different offences against the same suspect.

In short, Eurojust's unparalleled expertise helps to prevent conflicts by identifying best practice and offering solutions, thus speeding up the execution of mutual legal assistance requests and EAWs.

Eurojust can also provide non-binding advice in accordance with Article 17 of the EAW Framework Decision concerning breach of time limits or other legal problems.

A common-sense approach to the complicated matter of extradition tells us that Eurojust is the body best placed to provide advice on the application of

Case example 1

In a joint investigation team (JIT) concerning trafficking in human beings (THB) and the confiscation of seized property, Eurojust's help focused on the judicial development of the case. The victims of THB located in Member State A were arrested and interviewed with the help of police officers and prosecutors from Member State B in accordance with the provisions of the 1959 and 2000 MLA Conventions, so that their witness evidence could be used in the investigations of both Member States. In this way, the victims could be interviewed by their fellow countrymen, who had been specially trained to deal with vulnerable victims and witnesses. The testimonies obtained within the framework of the JIT could then be used by both Member States in their investigations.

Within the framework of this JIT, a decision was taken that the proceedings would be transferred to Member State B and that EAWs would be issued by Member State B, which would then be executed in Member State A. The perpetrators in Member State A were surrendered to Member State B and were brought to trial, together with their accomplices already arrested in Member State B. With the support of Eurojust, which arranged **two coordination meetings** in addition to two Level II meetings, the assessment of the evidence, the transfer of the criminal proceedings and **the execution of the EAWs were carried out within the framework of the JIT**.

The JIT activities resulted in a final conviction in Member State B. Some additional measures relating to the confiscation of property in Member State A were discussed between the JIT partners at Eurojust and, as a result, property was successfully confiscated in Member State A.

the EAW. Member States may seek Eurojust's advice in the event of multiple requests, and Eurojust shall be informed of delays that are likely to affect the time limit for execution of an EAW.

On a practical level, how does Eurojust prevent and resolve conflicts in the use of the EAW? Let's say two Member States approach Eurojust with EAWs for the same person. Eurojust contributes to the resolution of such conflicts by examining the request and offering, on some occasions, a non-binding opinion on which Member State is best placed to execute the EAW and by facilitating communication between the requesting Member States, thus providing a platform for efficient communication. Six such cases were opened at Eurojust in 2013 and all were successfully closed. Eurojust participates in this process as an impartial observer and bases its opinion on several factors, including the Member State in which the majority of crimes were committed. As

an impartial observer, Eurojust avoids decisions that could be favourable to a particular Member State.

Figures

In 2013, 221 cases concerning the execution of EAWs were registered at Eurojust. The Polish Desk made the greatest number of requests for help in relation to execution of EAWs, with 29 (representing 13.4 per cent of all EAW cases at Eurojust), followed by the Austrian (19), Belgian (17) and Bulgarian (17) Desks. The Italian Desk received the largest number of requests for execution of EAWs, with 37, followed by the Spanish (31) and UK (30) Desks.

A questionnaire on the practical operation of the EAW for 2011 was distributed to the Member States by the Council's General Secretariat Working Party on Cooperation in Criminal Matters (Experts on the European Arrest Warrant) (COPEN). The statistical results were

compiled in Council Document 9200/7/12 REV 7, dated 15 January 2013, including grounds for refusal and other obstacles to the operation of the EAW.

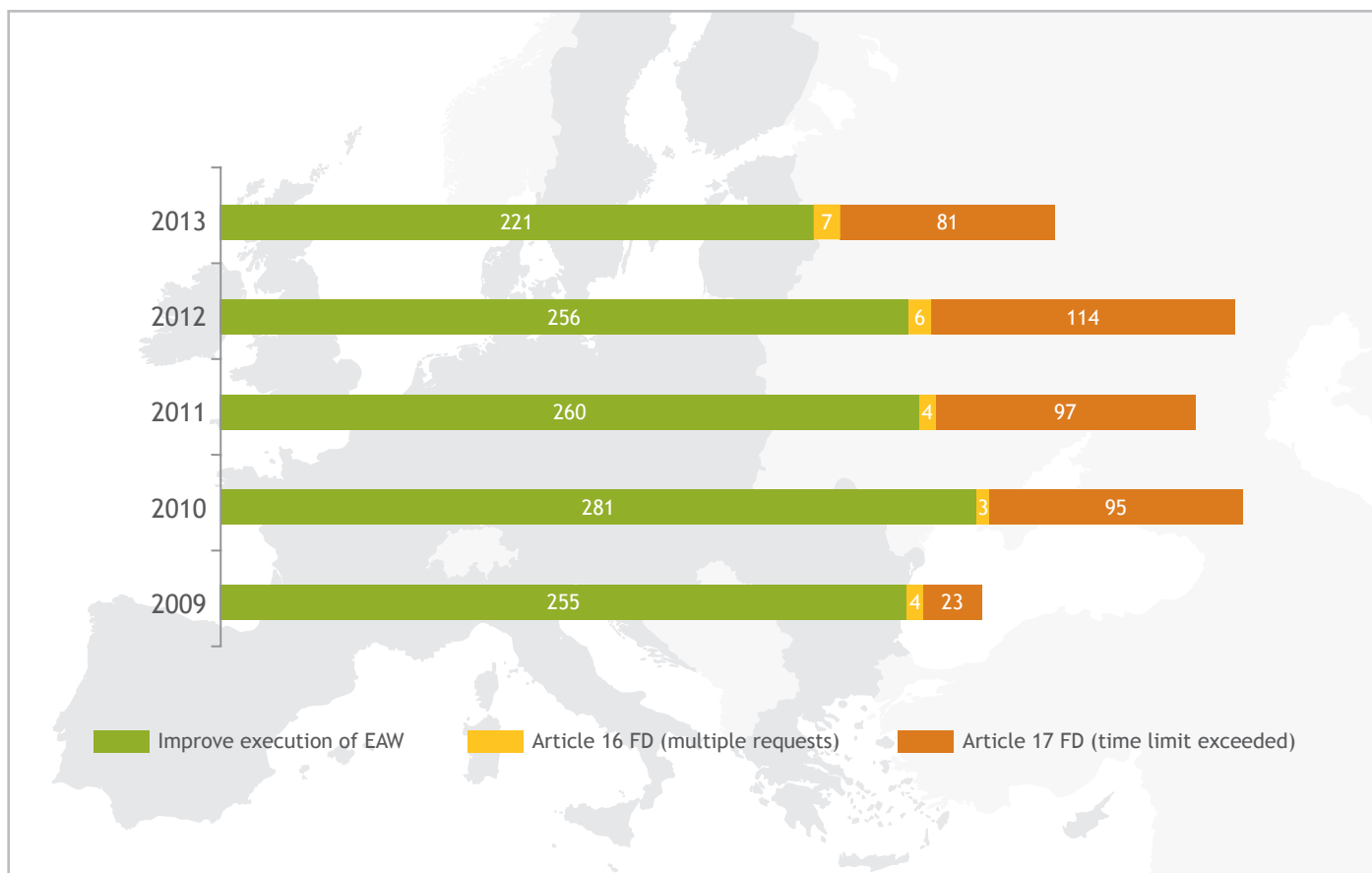
By collecting cases and discussing the issues and challenges involved, Eurojust has established a knowledge base that allows:

- ▶ the legal requirements of both the issuing and executing authorities to be clarified
- ▶ advice to be provided prior to drafting EAWs
- ▶ reporting to be carried out of breaches of time limits
- ▶ lines of communication to be established between national authorities
- ▶ the fast exchange of information between national authorities

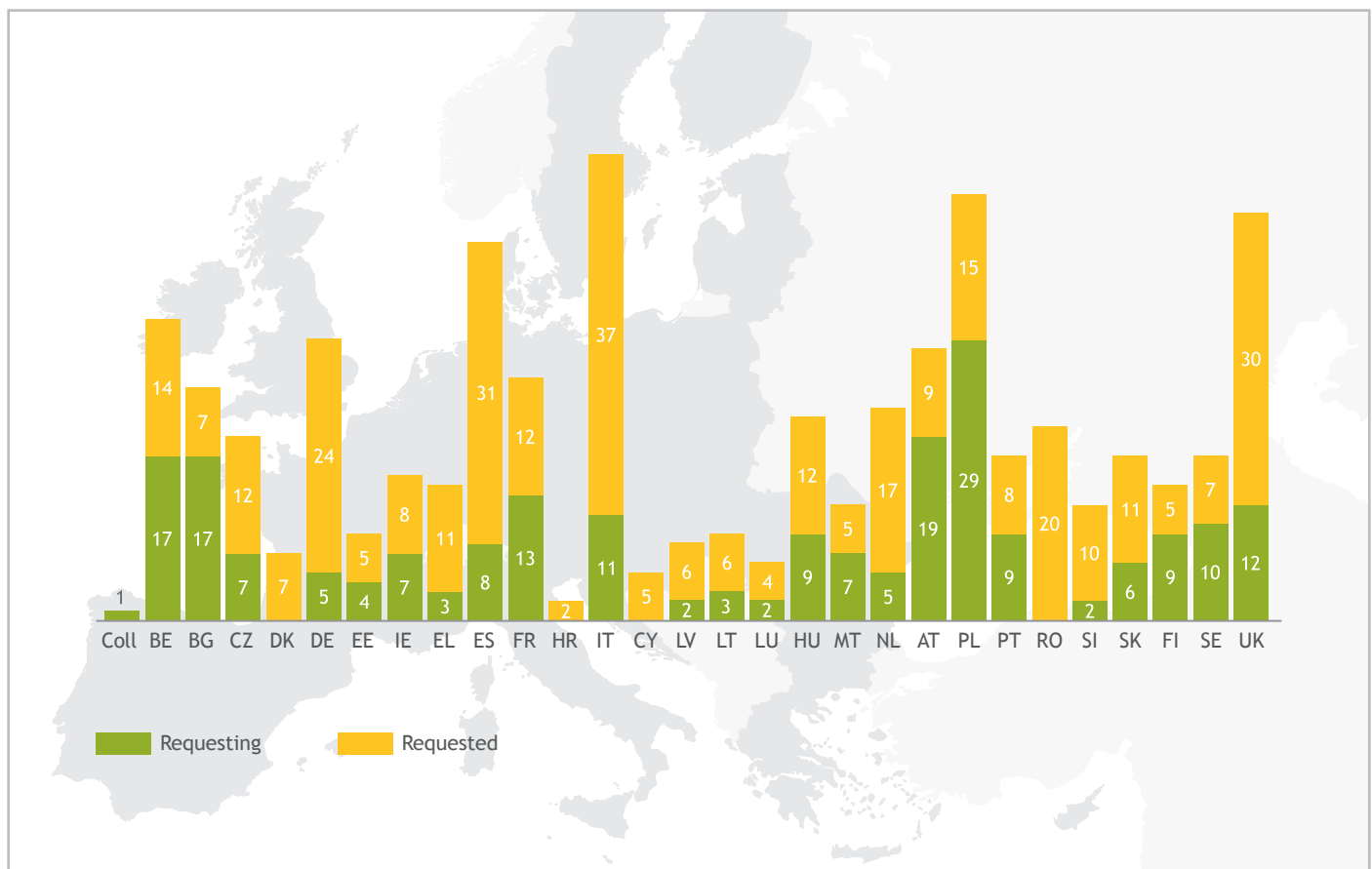
The role of Eurojust's Judicial Cooperation Instruments Team

The team, chaired by Mr Pietro Suchan, Assistant to the National Member for

Total number of cases involving EAWs registered at Eurojust 2009-2013



Execution of EAW cases referred to Eurojust in 2013 by requesting and requested Member State



Italy, is one of several teams within Eurojust that focus on specific issues. It has three main roles, to: (1) support and monitor the implementation of the Eurojust Decision in all matters related to judicial cooperation instruments; (2) promote the compliance of Member States with the obligations arising from relevant mutual recognition and judicial cooperation instruments, in particular the EAW Framework Decision; and (3) define the role and added value of Eurojust on relevant mutual recognition and judicial cooperation instruments.

To carry out its work, the team collects information on cases and discusses issues that have arisen with the purpose of agreeing on best practice and finding the most effective solutions to the problems faced. Cases and issues are evaluated in accordance with EU legislation and existing experience. Issues related to EAWs are discussed during regular meetings of the team. In 2013, the team provided an update to the

Note regarding the overview of European case law, constitutional issues and recurrent practical problems related to the application of the European Arrest Warrant. This document was disseminated to national authorities.

The team is also developing the discussion on the European Investigation Order (EIO), approved by the European Parliament on 7 March (PE-CONS 122/13), by representing Eurojust at COPEN meetings on this matter. The EIO is seen by one of the interviewees in this edition of *Eurojust News* as 'complementary to the European Arrest Warrant' and something that 'will help ease pressure on the EAW.' How will it ease this pressure? It will do so by allowing judicial authorities to far more easily request investigative measures and obtain evidence in other Member States. The EIO was proposed in April 2010 by seven Member States: Belgium, Bulgaria, Estonia, Spain, Austria, Slovenia and Sweden, based on the

principle of mutual recognition, and to simplify procedures in this regard by establishing a system to obtain evidence in criminal cases where there is a cross-border dimension. Eurojust will organise a strategic seminar on the EIO, *The European Investigation Order – a new perspective in judicial cooperation in the EU*, in 2015.



Mr Pietro Suchan

Strategic seminar *The European Arrest Warrant?: Which way Forward?*

On 10 and 11 June, Eurojust held a strategic seminar on the EAW, co-organised with the Greek Presidency. The seminar was combined with a meeting of the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union (Consultative Forum) convened by the Office of the Prosecutor General of Greece and supported by Eurojust, bringing together a wide range of experts and high-level representatives of national prosecution authorities as well as representatives from the EU institutions, including the European Court of Justice.

The timing of the seminar was no coincidence; it was timed to mark 10 years of the EAW, making it – as pointed out by our interviewees – an ideal opportunity to discuss the EAW's operation. The goal was to encourage judicial practitioners to exchange views on the practical operation and functioning of the EAW. Reflections focused on legal and practical shortcomings and possible solutions leading to progress in the effective application of EAWs.

Opening the seminar, Ms Coninsx pointed out that the EAW is considered an instrument marked with a high degree of success and effectiveness in the fight against serious organised crime

and an instrument of mutual recognition that has benefited practitioners. Ms Coninsx commented:

In the field of judicial cooperation, I believe we can all accept that it is crucial to dedicate our attention and efforts on the hindrances which appear to prevent a more efficient use of the European Arrest Warrant, the purpose of which is, no doubt, to contribute to the facilitation of the mutual efforts against crime with a cross-border aspect.

The seminar included four workshops that focused on central issues in the execution of EAWs: (1) scope and content of the EAW Framework Decision; (2) grounds for non-recognition and guarantees; (3) surrender procedure; and (4) effects of the surrender.

During the workshops, the participants contributed their experience and formulated conclusions that will lead to more practical solutions to improve judicial cooperation and make better use of the EAW. The outcome of the four workshops was presented on 11 June to the Consultative Forum. A discussion paper containing a number of questions was circulated to the participants prior to the meeting to stimulate the debate. Following the debate, Consultative Forum members discussed challenges and best practice in the investigation and prosecution of corruption

cases and the recommendations of the EU's first Anti-Corruption Report.

The final session of the meeting of the Consultative Forum was dedicated to recent EU legislative developments, including the application of Protocol 36 to the Treaties, the state of play of the Regulations on Eurojust and the establishment of the European Public Prosecutor's Office.

The active role of Eurojust in enhancing judicial cooperation, assisting and providing support to practitioners throughout the European Union in the effective implementation and application of the EAW, was clearly demonstrated during the seminar, and was echoed in the conclusions of the workshops.

Mr Suchan, speaking at the seminar, noted that Eurojust's assistance in EAW cases can be varied and diverse in level of complexity. After providing several case examples to illustrate Eurojust's role, Mr Suchan pointed out that Eurojust can typically provide advice and information on how national courts in the Member States proceed in given situations, ensuring that material on the general practice in other EU jurisdictions is promptly and effectively made available for consideration, thus allowing the coordination and execution of requests in a swift and efficient manner. The EAW seminar report will be published as an EU document in autumn of 2014.

European Judicial Training Network

Baroness Ludford, Professor Weyembergh and Professor Mitsilegas, in their interviews in this issue, as well as Ms Coninsx in her remarks at the ECBA Spring Conference, highlighted the added value that training of judges and prosecutors can provide in the use of judicial cooperation instruments such as the EAW. With that goal in mind, Eurojust signed a Memorandum of Understanding (MoU) with the European Judicial Training Network (EJTN) in 2008, formalising the exchange programme to familiarise these judges and prosecutors with the tasks, functioning and activities of Eurojust, including the use of the EAW. In addition, Eurojust cooperates with the EJTN within the framework of



Mr Nikos Ornerakis, National Member for Greece, and Ms Michèle Coninsx, President of Eurojust

Criminal Justice Project 1 (*International Judicial Cooperation in Criminal Matters in Practice, 'EAW and MLA simulations'*). Under this project, several seminars per year throughout the Member States are held. At these seminars, Eurojust representatives contribute to the development of the interactive and practical training and raise awareness of the daily work of Eurojust.

European Judicial Network

The Secretariat of the European Judicial Network (EJN) is hosted by Eurojust. The EJN is a network of national contact points for the facilitation of judicial cooperation in criminal matters. The EJN website contains three specific tools to assist in the practical implementation of the EAW: (1) the *EAW Atlas*, which helps the judicial authorities identify the competent executing authority and also provides basic information on the legal requirements in the executing Member State; (2) the *EAW Compendium Wizard*, which provides assistance in drafting an EAW form; and (3) the *EAW Library*, containing practical information on the EAW, including the full text of the EAW Framework Decision, forms, notifications, a handbook, case law, and national legislation. For further information, please see www.ejn-crimjust.europa.eu/ejn/. ■

Case example 2

The French authorities initiated a drug trafficking case at Eurojust concerning an Albanian organised crime group (OCG) trafficking heroin and cocaine between the Netherlands, France and Albania. The OCG had contacts in Belgium and other countries along the route from France to Albania (Italy, Switzerland, Spain and possibly Greece). Requests for cross-border surveillance were sent and executed.

Eurojust hosted three coordination meetings to exchange information, to coordinate the execution of surveillance requests and to discuss possible *ne bis in idem* issues. As France and Italy shared two targets, a potential conflict of jurisdiction arose. Eurojust was asked to conduct an analysis of the situation. As a result of the analysis, the two jurisdictions agreed that France was in a better position to prosecute the case, and Italian authorities transferred the proceedings to France.

A common action day was planned in the Netherlands, Belgium, France and Switzerland. These common efforts led the investigators to detect a future illicit drug transport from the Netherlands to France.

In March 2012, **a coordination centre was held at Eurojust** to ensure smooth information exchange during the action day, with analytical support provided by Europol. Individuals involved in the drug trafficking operation were arrested and the drugs seized. This day of common action triggered subsequent law enforcement actions, resulting in 17 arrests, several house searches in France and the Netherlands, and the seizure of 12 kg of heroin.

The Italian authorities, in close contact with the French and Dutch police, had been targeting the same OCG for approximately one year and launched an operation on Italian territory in May 2012. **This operation resulted in the execution of 13 EAWs** and the seizure of 15 kg of cocaine and 4 kg of heroin. The swift and flexible organisation of the OCG required intensive exchanges of information between the competent national authorities, particularly between the investigative bodies in the involved countries. This round-the-clock information exchange, over approximately two weeks, was facilitated by Eurojust.

The active role of Eurojust in enhancing judicial cooperation, assisting and providing support to practitioners throughout the European Union in the effective implementation and application of the EAW was clearly demonstrated during the seminar on the EAW, and was echoed in the conclusions of the workshops

Between 2007 and 2013

1 730

EAWs registered at Eurojust

35

formal requests to provide advice

462

notifications of breach of time limits in execution of EAWs registered at Eurojust

Source: Eurojust Annual Report 2013

Practical and legal issues

A number of practical and legal issues in the execution of EAWs have been identified by Eurojust through its casework.

The issues identified include:

(1) Slow communication between competent authorities.

(2) Differences between legal systems: problems related to differences between common law and civil law systems. In such cases, Eurojust played an important role in assisting the national authorities, enhancing mutual understanding and providing practical solutions.

(3) Differences between legal systems, namely in relation to the conditions to be met under domestic law before an EAW can be issued, have sometimes resulted in the non-execution of an EAW, because under the law of the executing Member State, these have not been met in the issuing Member State (e.g. issue of a person being considered a suspect or an accused is linked to the separation between investigation and prosecution).

(4) Poor quality of the translation of the EAW. Inaccurate translations of EAWs have caused basic problems in understanding. Eurojust has been able to overcome these practical difficulties

given its combination of practitioner experience and language skills. For example, the choice between the word 'accused' and the word 'suspect' could have far-reaching consequences for the execution of an EAW.

(5) Issues linked with conflicts of jurisdiction. At times, an EAW relates to a case in which there is a parallel investigation in the executing Member State or in which the executing Member State initiates an investigation against the requested person for the same facts, as a result of the receipt of the EAW. This has caused difficulties for the issuing Member State. ■

Conferences such as this provide a forum for specialised legal practitioners to meet national prosecutors and experts ... and permit a frank exchange of views and information

Spring Conference of the European Criminal Bar Association

In April, Ms Coninx participated in a panel discussion at the ECBA's Spring Conference in Warsaw devoted to the EAW 10 years after implementation, entitled *Legal aid – Privilege for criminals or essential for fair proceedings?*. The conference attracted speakers from across Europe. Ms Coninx's speech concerned Eurojust's role and experiences.

In addition to detailing the ways in which Eurojust can assist with issues relating to the use of the EAW, Ms Coninx outlined a number of important issues and described the challenges ahead. She said that the successful application of the EAW can only occur with trust on three levels: trust between Member States (implementation in the Member States must

be closely followed), trust between legal practitioners (training must be given), and the trust of citizens (both victims and suspects) (procedural safeguards must be in place and victims' rights must be protected). Ms Coninx pointed out that a majority of judges and prosecutors do not view the EAW as part of their everyday work. Difficulties arise when knowledge of foreign legal systems and EU criminal justice instruments is lacking or misunderstood. Eurojust can help to overcome these obstacles.

Conferences such as this provide a forum for specialised legal practitioners to directly meet national prosecutors and experts in the use of the EAW, and permit a frank exchange of views and information. Ms Coninx's speech was published on the ECBA website. See http://www.ecba.org/extdocserv/conferences/warsaw2014/Coninx_warsaw_EAW. ■





Interviews

Baroness Sarah Ludford is a qualified barrister. She has been a member of the House of Lords since 1997 and was a Member of the European Parliament for London from 1999 - 2014. Baroness Ludford previously worked in Whitehall, in the European Commission, for Lloyd's of London and American Express, and served as a local councillor in the London Borough of Islington. In the European Parliament, Baroness Ludford was a member continuously until 2014 of its Civil Liberties, Justice & Home Affairs Committee (LIBE) and was the UK Liberal Democrat European spokeswoman on justice and human rights. She has had a leading role in the past 15 years in the whole range of the LIBE Committee's work, from asylum, immigration and visa policy to data protection. She has focused particularly in the last parliamentary term on criminal justice and procedural rights issues, was Rapporteur on the Directive on rights to interpretation and translation and most recently on a report calling for reform of the European Arrest Warrant.

***Eurojust News:** In your statement to the European Parliament on your proposals for the EAW, you said that the EAW 'was launched without the support and safeguards necessary to make it strong and sustainable, not least as MEPs were ignored in the legislation.' Could you outline the support and safeguards you would like to see implemented?*

Baroness Ludford: 'The EAW is a crucial weapon in the fight against crime. However, varying criminal justice standards and practices throughout the EU have led to legitimate criticisms that the EAW needs to be improved. The mutual trust in standards and practices which lies at the heart of the EAW system cannot just be assumed; it must have a solid foundation.

The safeguards my report calls for (particularly for a proportionality check and human rights refusal) will ensure that the EAW is used not only efficiently but also fairly, respecting fundamental rights of suspects or accused persons wherever they find themselves in the EU.

The report's proposals also include a call for an effective legal remedy to be available to individuals, not only the right to appeal against execution of the EAW but also compensation for miscarriages of justice. Effective and well-informed EAW proceedings should be facilitated by strengthening training and contact networks of judges, prosecutors and criminal defence lawyers. The European Parliament also wants to address the long-standing problem of poor standards of detention, including conditions of pre-trial detention in the EU.'



Baroness Sarah Ludford

You also discussed the incorporation of the European Investigation Order's proportionality check and human rights safeguard clause, and stated that this 'must be duplicated for the EAW,' backing up the recommendations in your report. However, other

As organised crime becomes increasingly sophisticated, reinforcing judicial cooperation in criminal matters is the key to securing an Area of Freedom, Security and Justice and the EAW is a crucial weapon

experts believe that an explicit proportionality check and human rights safeguard clause will not make a huge difference in practice. For instance, judicial authorities from Member States that have an explicit human rights safeguard clause state that this ground is used extremely rarely. What is your view on such statements? And if such an explicit human rights safeguard clause were to be included, would you believe that national judicial authorities are aware of the criteria that they need to take into account to apply this clause correctly?

I believe that a considerable degree of improvement could in fact be made by enhanced dialogue and cooperation between the relevant authorities, which is the reason my report proposes a consultation procedure. It also calls on the Commission to establish and make easily accessible a database collecting all national case law relating to EAW and other mutual recognition proceedings to facilitate the work of practitioners, and the EAW Handbook could also include guidance.

But the evidence I have read and heard – ever since 2001, in seminars and hearings I held in the Parliament such as in October 2013 at which people from a range of perspectives spoke, in discussions with Anand Doobay and Professor Anne Weyembergh and in their reports for *European Added Value Assessment* – convince me that an explicit proportionality check and human rights safeguard clause could make a real difference to stop misuse and breach of rights. Obviously, until we have those in place, it is impossible to prove this!

The problem of EAWs being issued for minor offences must be remedied as it challenges mutual trust, compromises the good functioning of the system by leading to unwarranted arrests which disproportionately interfere with the rights of requested persons, and besmirches the reputation of the measure. My proposal for a proportionality check

in the issuing state seeks to ensure that an EAW is reserved for cases the instrument is really designed to deal with: it will guide and oblige authorities to really consider whether the EAW is necessary, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, the impact on the rights of the requested person and the availability of an appropriate, less intrusive alternative measure. I believe that the number of incorrectly issued EAWs will thereby be reduced.

An explicit and EU-wide human rights safeguard clause in the EAW Framework Decision will both remind judicial authorities that they have a (joint) obligation to ensure that fundamental rights are guaranteed and do so with a consistent definition, replacing the present patchwork in which some Member States have such a provision domestically such as that of the UK (section 21 of the Extradition Act 2003). The EU test could usefully introduce, as suggested by Advocate General Sharpston in *Radu*, a somewhat lower threshold than the Strasbourg “flagrancy” test.’

You mentioned the EAW being used as a ‘fishing expedition to interview suspects and witnesses’. Have you seen evidence of this or is it a suspicion that stems from the large number of EAWs issued by some countries? How do you believe this problem should be addressed?

“The EAW is intended to be used “for the purposes of conducting a criminal prosecution” (or post-conviction sentence). I certainly know of cases where the EAW seems to have been used prematurely as a step in the investigation, before the case is ready for prosecution, let alone for trial, resulting in individuals languishing in pre-trial detention while the prosecution prepares its case. Examples from the UK (which I know best) are: a case of pre-trial detention in a Greek

prison for 15 months before acquittal; and a case of extradition to Hungary in 2009 in the absence of a decision to prosecute, in which the suspect spent four months in prison during which he was only interviewed once by the police and tried only in 2012.

The European Parliament placed an emphasis on encouraging the use by the judicial authorities, when appropriate, of alternative, less intrusive mutual recognition instruments to help ensure respect for the rights of suspects and accused persons and confine the EAW to its proper use. I’m very pleased that the European Investigation Order has been agreed by the EU co-legislators because allowing police and prosecutors to share evidence and information should take the strain off the EAW and prevent the latter being used as an investigative tool. In addition, the European Supervision Order (bail) should help facilitate the avoidance of unnecessary pre-trial detention and premature surrender. I believe a proportionality check by the issuing state and a consultation procedure for competent authorities in the issuing and executing Member States to exchange information, including on trial-readiness, could help to confine the EAW to its proper purpose.’

What is the added value of the EAW? How do you assess Eurojust’s current role in its application? Can you foresee any expansion in the role of Eurojust with regard to the issuance and execution of EAWs?

‘We are clearly more effective in fighting the current challenges of serious cross-border crime when we work together in Europe; as organised crime becomes increasingly sophisticated, reinforcing judicial cooperation in criminal matters is the key to securing an Area of Freedom, Security and Justice, and the EAW is a crucial weapon. The average time for extradition has decreased from

one year pre-EAW to around 15 days with consent and 48 days without.

Eurojust plays a key role in helping to implement EAWs and supporting competent authorities to improve the effectiveness of investigations and prosecutions. Its role in facilitating coordination and cooperation and developing synergies with other agencies such as Europol is crucial in this endeavour.'

Are you confident that the proposals you recently put forward in the European Parliament will be adopted?

'My report received impressive cross-party input and support and was adopted by an overwhelming majority in the European Parliament. The weight of opinion in the European Parliament has made itself felt and will not be ignored without making a noise, so I believe the Commission will need to take note of that and come forward within the next year with proposals that meet MEPs' demands. It is certain that this issue will be taken up by the new European Parliament in the hearings and that the nominee for Justice Commissioner will be pressed on this matter in the hearings.'

After 10 years, can you say that the EAW has been a success story? Does it have a bright future?

'Yes, it is a success, a crucial crime-fighting tool which has transformed cross-border police and judicial cooperation. Justice delayed is justice denied, and the traditional extradition arrangements were unfair on victims as well as the public, and unsuited to an EU with free movement of people. But because the EAW is the cornerstone and flagship of mutual recognition, it is crucial that valid criticisms levelled against it be addressed and flaws in its operation removed. Once the reforms I have proposed are put into practice, we will have a more balanced EU area of criminal justice in which the EAW, bolstered by necessary safeguards, will indeed have a very bright future.' ■

Professor Anne Weyembergh holds a Master's Degree in Public and Administrative Law and a Master's Degree in International Law, and completed a PhD in Law at the Université libre de Bruxelles (ULB). Ms Weyembergh is a full-time Professor at the ULB's Institute for European Studies (IEE). Together with Serge de Biolley, she founded and coordinates the European Criminal Law Academic Network (ECLAN). In addition, she is the coordinator of the IEE-ULB team on European criminal law. We were fortunate to be able to conduct a brief interview with Professor Weyembergh during the seminar.

Eurojust News: What would you say are the biggest problems with the EAW?

Professor Weyembergh: 'Apart from the issue of incomplete or unfaithful implementation of the EAW Framework Decision by national transposing laws, which is a problem falling within the jurisdiction of the Commission, one of the biggest problems with the EAW is the variable geometry between the various EAW systems. There is no single uniform EAW mechanism but as many as there are transposing laws. Such diversity, which reflects the diversity among national procedural systems and different national sensitivities, complicates the tasks of practitioners who have to deal with all those laws and national specificities. Other important issues affecting the functioning of the EAW result from the current incompleteness and imbalances of the EU area of criminal justice. This area is indeed still under construction.'

Is there a political will to legislate uniformly?

'To legislate uniformly would mean adopting an EU regulation. The latter does not have to be transposed within the national legal orders but is directly applicable. It would thus present the advantage of "reaching" more uniformity. The text of the TFEU allows the development of mutual recognition through regulations. However, after the entry into force of the Lisbon Treaty, the EU legislator has opted to further develop mutual recognition via directives, which allow Member States to keep their specificities.

Cooperation in criminal matters is sensitive from a national sovereignty point of view. So the move to real uniformity is quite difficult to accept for Member States. A move towards an approximation

of EAW mechanisms throughout the European Union would be more realistic for the moment, but even this is quite difficult and risky. Indeed, a potential EU legislative revision of the EAW Framework Decision must be handled carefully, considering the real risk of regress if we were to reopen the negotiations on the EAW.

The danger of taking steps backwards must of course be taken very seriously, both practically and symbolically. That's why in our research paper for the European Parliament we favoured a transversal legislative initiative, which would concern all or most of the mutual recognition instruments. Such a transversal initiative would present a double advantage: on the one hand, the advantage of ensuring more consistency among mutual recognition instruments, which is clearly lacking at the moment, and, on the other hand, the advantage of lowering the risk of opening Pandora's Box. Anyway, the legislator should listen carefully to practitioners and take into consideration the problems and difficulties they pinpoint after 10 years of practical implementation of the EAW.'

You mentioned during your keynote speech that when Member States request additional information, this suggests a degree of mistrust. Do you think that within the EU there will ever be the same levels of trust experienced in the Nordic States?

'Nordic trust is often presented as an example to follow. However, it is based on a high level of approximation between the Nordic States. The European Union is not marked by such a high level of approximation. A smooth and flexible cooperation culture has developed between the Nordic States; it has a long history. The EAW is now only 10 years old. A better and deeper cooperation

culture has still to develop within the European Union. Such evolution will depend on the strengthening of various aspects pertaining to the EU area of criminal justice, particularly the further development of approximation of legislation and of training.’

Do you see a role for Eurojust with regard to the EU database of decisions relating to the EAW that you mentioned in your speech?

‘When working on the research paper for the European Parliament, we realized how difficult it is to have access to the basic materials, i.e. national judicial decisions relating to the EAW and the other mutual recognition instruments. In some Member States, and particularly in those States where the execution of EAWs is decentralised, it is more difficult than in others. Better tools are needed to be able to better assess the functioning of EU cooperation. Easier access to foreign decisions related to mutual recognition should be ensured to all the competent authorities and defence lawyers.

So, we proposed that the European Union should fund the establishment of an EU national case law database concerning the EAW and other mutual recognition instruments. This would facilitate the identification of recurring and common problems and thus ease an autonomous and complete evaluation of cooperation; it would provide useful information and a source of inspiration for all practitioners; promote a real dialogue between the competent authorities; and help bring national practices closer together. The collected data should of course be regularly updated and thoroughly analysed. Such analysis could, for instance, concern the grounds for refusal used by national authorities. A better and objective assessment of such use is indeed crucial to highlight the main obstacles and difficulties encountered in the EAW’s practical application. The implementation of such project could be entrusted to a group of independent academic experts throughout the European Union.

However, it should be complemented by regular evaluation reports from Eurojust, which could issue recommendations on



Professor Anne Weyembergh

A better and deeper cooperation culture has still to develop within the European Union

the basis of the difficulties encountered in its activities. Eurojust deals with a large number of EAWs and has a real overall vision of the main and recurring problems. Its added value in this regard is thus essential.’

Do you agree with Commissioner Reding that a revision of the EAW is premature?

‘Assessing the EAW on a complete basis and identifying problems and difficulties related to it was a difficult task. It must be considered within an overall picture. The EU instruments of criminal justice must indeed be considered as a whole.

The interactions between the different aspects and instruments of the EU area of criminal justice must be taken into account. But some solutions or part of the solutions are too recent, are not yet transposed or are still under negotiation. The best example of this consists in the directives relating to procedural guarantees, which are really complementary to mutual recognition instruments, but which are not yet in force in all Member States; far from it. This explains why some experts we interviewed consider the revision of the EAW Framework Decision as being premature. And I understand this point of view.’ ■

Professor Valsamis Mitsilegas is Head of the Department of Law and Professor of European Criminal Law and Director of the Criminal Justice Centre at Queen Mary University of London. Previously, he served as legal adviser to the House of Lords European Union Committee, and is a consultant to national parliaments, EU institutions such as the LIBE and CRIM Committees of the European Parliament, and international organisations, NGOs, think tanks and academic networks. Professor Mitsilegas is an expert in EU law and transnational organised crime, corruption and money laundering. He is a widely published author of works on European criminal law, immigration and asylum and security and counter-terrorism law. Professor Mitsilegas is also a Coordinator of the European Criminal Law Academic Network (ECLAN).

Eurojust News: Has the EAW been a success story? Which major difficulties from a legal and practical point of view do you see in the application of the EAW and how should they be addressed? Do you consider that the proposals recently put forward in the European Parliament adequately address its shortcomings?

Professor Mitsilegas: ‘The EAW Framework Decision has been the most successful instrument in the field of European criminal law in terms of its reach into domestic criminal justice systems and its implementation by Member States. A key challenge in the operation of the EAW Framework Decision is the attempt to reconcile the speedy and quasi-automatic recognition and execution of national judicial decisions with the need to respect national legal diversity and fundamental rights.

The proposals put forward by the European Parliament highlight a number of the key challenges facing the operation of the EAW. The way forward in any law reform or guidance related to the EAW is to recognize fully and explicitly failure to respect fundamental rights as a mandatory ground of non-execution of an EAW and to place greater emphasis on the implementation of EU standards on the rights of suspects and defendants, including detention conditions, in Member States.’

Do you consider mutual trust to have improved since the introduction of the EAW?

‘The operation of the EAW Framework Decision has certainly prompted judicial authorities responsible to recognize



Professor Valsamis Mitsilegas

A key challenge in the operation of the EAW Framework Decision is the attempt to reconcile the speedy and quasi-automatic recognition and execution of national judicial decisions with the need to respect national legal diversity and fundamental rights

and execute EAWs to consider carefully requests from their counterparts in other Member States and to attempt to achieve efficiency in the operation of the EAW while recognising the diversity of legal systems in other Member States. A key factor enhancing mutual trust in this context has been the introduction of judicial training and practical measures including regular meetings between judges.'

You wrote in an article in 2012 entitled 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice that 'the introduction of a proportionality check...may serve as a limit to the automaticity of the European Arrest Warrant System.' Has it since proved to be a limiting factor?'

'The need to adhere to the principle of proportionality in the operation of the EAW has been highlighted by national governments and national courts alike, and the principle can currently be found in both EU criminal law (the European Investigation Order) and national implementing law (the recent legislation amending the 2003 Extradition Act in the UK). While one view of proportionality grants primary responsibility for adherence to this principle to the authorities of the issuing Member States, automaticity in the execution of the EAW will be limited primarily if breach of proportionality is treated as a ground to refuse to execute an EAW, in particular in cases where such breach would essentially constitute a breach of fundamental rights. A more direct way of addressing

proportionality concerns related to the overuse of the EAW by national authorities would be to define the scope of the conduct falling within the EAW and the penalty thresholds triggering the operation of the EAW Framework Decision in a more specific way.'

Can you explain why some Member States issue thousands of EAWs each year, while others issue less than one hundred?'

'Geographical, mobility and population factors may serve to provide answers to this question. Differences in national legal systems with regard to choices and obligations related to prosecution may also explain such discrepancies.'

What is the added value of the EAW? How do you assess Eurojust's current role in its application? Can you foresee any expansion in the role of Eurojust with regard to the EAW?'

'The EAW has served to speed up and simplify judicial cooperation in criminal matters in the EU. By constituting a well-implemented, emblematic instrument of European criminal law, it has also helped to promote further European integration in the field by resulting in a series of important constitutional rulings by the Court of Justice and national courts, as well as in the adoption for the first time of EU standards on the rights of suspects and defendants. Eurojust can play a key role in the operation of the EAW system, mainly by focusing on educating the judicial authorities who are responsible for its

operationalisation in the legal systems of other Member States and by facilitating communication channels and training of the national judiciary. Eurojust can play a key role in creating an authoritative picture of the use and key legal issues arising from the implementation of the EAW in Member States. Subject to the establishment of clear legal rules taking into account the rights of the defence, Eurojust also has a key role to play in advising national authorities when examining EAWs in the context of conflicts of jurisdiction.'

The partial abolition of the 'double criminality' requirement and the surrender of nationals were described as 'controversial' features of the EAW Framework Decision when this instrument was adopted. Do you believe that after ten years of EAW practice they are still considered controversial?'

'The partial abolition of the dual criminality requirement has not proven to be a particular challenge in the operation of the EAW Framework Decision. The key challenge in this context has been and remains to ensure the full compliance of the EAW with fundamental rights. The adoption and full implementation of EU standards on the rights of the defendant and the enhanced on-the-ground monitoring of national criminal justice systems as regards the position of individuals affected by EAWs (including in particular the length of trial and pre-trial proceedings and detention as well as detention conditions) are all key factors to ensure full compliance with fundamental rights.' ■

Judge Lars Bay Larsen has been a Judge at the ECJ since January 2006. He was awarded degrees in political science (1976) and law (1983) at the University of Copenhagen; was an Official at the Ministry of Justice (1983-85); Lecturer (1984-91), then Associate Professor (1991-96) in Family Law at the University of Copenhagen; Head of Section at the *Advokatsamfund* (Danish Bar Association) (1985-86); Head of Section at the Ministry of Justice (1986-91); called to the Bar (1991); Head of Division (1991-95); Head of the Police Department (1995-99) and Head of the Law Department at the Ministry of Justice (2000-03); Representative of the Kingdom of Denmark on the K-4 Committee (1995-2000), the Schengen Central Group (1996-98) and the Europol Management Board (1998-2000); and a Judge at the *Højesteret* (Supreme Court) (2003-06).

Eurojust News: In your article, Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice, you stated that 'National Par-

liaments, prosecutors, defence lawyers, national judges and we at the ECJ in Luxembourg have since had to live with the inevitably less than perfect outcome'

of the rushing through of EAW legislation following 11 September 2001. Has this made your time at the ECJ – when dealing with questions relating to the



Judge Lars Bay Larsen

EAW – more interesting and challenging? Has the ECJ been able to clarify issues which the legislator has left unclear, and to what extent (or on what points) do you believe further legislative developments/adjustments are still needed?

Judge Larsen: ‘Whenever the EU legislators in Brussels – because of urgency, political disagreement or for any other reason – apply what is often referred to as “constructive am-

biguity” when drafting new legislation, it inevitably implies a *de facto* delegation of legislative competence from the legislators to the Court in Luxembourg. From time to time, this is perhaps unavoidable, also given the difficulties in achieving a qualified majority in the Council, difficulties which I know quite well from my time in the K-4 Committee (now known as CATS). Nevertheless, it is not ideal, when choices which are essentially of a political nature are pressed upon judges.

Certainly, it makes life at the Court very interesting at times, as the Court normally cannot escape such delegation of legislative power, since we, in a preliminary ruling case, must provide an answer to the national judge that will allow him or her to decide the pending national case. But I would like to add that it is not a “legislative role” that we, at the Court, strive for. It is more a duty that we – maybe a little bit reluctantly – feel obliged to perform, when we are called upon to do so.

I believe this is well reflected in our jurisprudence on the EAW, in particular in the case law on Articles 4(6) and 5(3) (*see, notably, Cases C-66/08, Kozłowski, C-123/08, Wolzenburg, and C-42/11, Lopes Da Silva Jorge*).’

Has the EAW been a success story? Which major difficulties from a legal and practical point of view do you see in the application of the EAW and how should they be addressed? Do you consider that the proposals recently put forward in the European Parliament adequately address its shortcomings?

‘I actually believe that the EAW has been quite a success and a rather concrete example of how we are “united in diversity”.

Having said that, I believe that the EAW has also, to some extent, been a victim of its own success, notably given the fact that a very high number of issued EAWs come from a single Member State, and that many of these EAWs do not concern serious crime.

A further general point is perhaps that past experience with the EAW has demonstrated that mutual recognition, both politically and judicially, is easier to handle if combined with at least some form of approximation of national legislation.

But, naturally, it is for the EU legislator(s) – and not for me as a European judge – to draft and adopt any new European legislation in this field.’

Do you consider mutual trust to have improved since the introduction of the EAW?

Past experience with the EAW has demonstrated that mutual recognition, both politically and judicially, is easier to handle if combined with at least some form of approximation of national legislation

'Yes. I still regard the launch of the initiative on mutual recognition based on mutual trust in Turku and the subsequent decisions to this effect at the European Council in Tampere in 1999 as important steps with a view to improving judicial cooperation in penal matters within the European Union. And the EAW was the first instrument to really implement these ideas.

At the same time, you have to be aware of a tidal wave which has rolled in the opposite direction, demanding that fundamental rights should *systematically* be controlled, not only in the issuing Member State but also in the requested Member State. Taken at face value, such demands threaten to roll back European judicial cooperation to a 1950s level – and then, in fact, it would no longer be a tidal wave, but a tsunami.

Obviously, I am not, with these remarks, questioning the jurisprudence of both the Strasbourg Court and my own Court developed on the Dublin regime in the event of apparent and systemic violations of fundamental rights of asylum seekers returned from other Member States to Greece (ECtHR Case no. 30696/09, *MSS vs. Greece and Belgium*, Case C-411/10, *N.S.*, and Case C-4/11, *Puid*), case law that I have no doubt will equally apply in the other Areas of Freedom, Security and Justice.

Certainly, the requested Member State should not have the right to “turn a blind eye” to manifest systemic violations of fundamental rights in the requesting Member State. All I am saying is that fear of falling into that ditch should not lead us to scrap the Principle of Mutual Trust and tumble head on into the ditch on the other side of the road. For the EU legislator as well as for the courts (European as well as national ones), there is a balance to be struck based on the presumption, generally

valid, that the requesting Member State respects its obligations vis-à-vis fundamental rights. But this is a presumption which may be rebutted or may simply evaporate due to the circumstances.'

What is the added value of the EAW? How do you assess Eurojust's current role in its application? Can you foresee any expansion in the role of Eurojust with regard to the EAW?

'As I was a little bit involved in the setting up of Eurojust quite a few years ago now, it is a real pleasure for me to see how well it has developed as an institution, and the positive influence it has had in developing European cooperation. Still, from time to time, I come across one or another pending case at the Court in Luxembourg where I cannot help asking myself why Member States apparently failed to cooperate in an efficient manner – in spite of the existence of Europol, Eurojust and the judicial networks that we also established maybe 15 years ago. Europe has come a long way, but we can do better!'

The partial abolition of the 'double criminality' requirement and the surrender of nationals were described as 'controversial' features of the EAW Framework Decision when this instrument was adopted. Do you believe that after ten years of EAW practice, they are still considered controversial?

'The jurisprudence on Articles 4(6) and 5(3) to which I referred earlier – and the very different ways of implementing these provisions of the EAW in national law – probably to a certain extent reflect the politically sensitive character of these issues.

Several Member States (including the Nordic States) have for many more years had a more selective practice of extraditing own nationals without double

criminality *vis-à-vis* selected (Member) States, but expanding such schemes to a Union of 28+ Member States is still politically quite another thing.'

As you know, there has been a lot of discussion and debate about the lack of an explicit human rights refusal ground. In her Opinion under the Radu judgement, Advocate-General Sharpston argued that the ECJ should not necessarily adopt the same severe test as developed by the European Court of Human Rights. With reference to that Opinion, do you believe ECJ case law will develop in line with the criteria that have been developed in the case law of the European Court of Human Rights in extradition cases, or that the ECJ will develop its own criteria?

'The *Radu* case was heard by the Grand Chamber and Advocate General Sharpston had to allow for the eventuality that the Grand Chamber would choose to make some more general observations on the protection of fundamental rights in cases on the EAW.

As you can see from the judgement, the Court chose not to do so and went pretty straight to the heart of the matter “that the executing judicial authorities cannot refuse to execute a European arrest warrant issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard in the issuing Member State before that arrest warrant was issued.” And the Court refrained – in my view wisely – from developing general principles on fundamental rights in an *obiter dictum* in a case where there was no need to do so.

We will then probably have to wait – perhaps impatiently – for one or several cases where such principles or guidelines are needed to know their material content.' ■

Case example 3

France opened a case in July 2012 concerning an OCG involved in illegal immigration. The OCG was located in France, Belgium and the UK and had links to Greece and Turkey as well as to the Netherlands. It had a highly sophisticated and complex logistical organisation, with the location of the base of operations shifting from France to Belgium.

The OCG made illegal Kurdish immigrants pay approximately EUR 2 000 per person via cash or bank transfer to the UK. Subsequently, the illegal immigrants were collected from parking areas in Belgium and France and put on trucks that transported them to ferries sailing from Calais to the UK. This operation was repeated each night. The OCG is believed to be responsible for attempting to smuggle between 20 and 30 illegal immigrants into the UK every day, with an estimate of 10 people successfully smuggled daily, accounting for approximately 4 000 illegal immigrants per year.

Eurojust supported the successful management of the case by holding two coordination meetings. These meetings were followed by the signing of a JIT agreement between France and Belgium in October 2012. The UK joined this JIT in February 2013. The JIT was co-funded by Eurojust via the JIT Funding Project. In August 2013, a coordination centre was set up at Eurojust and run by Eurojust's French, Belgian and UK Desks. Europol supported the case by deploying a mobile office to France for on-the-spot intelligence analysis.

Successful actions were conducted by police authorities in France, Belgium and the UK and led to the arrest of 36 persons, the issuance of two competing EAWs, and to 45 premises being searched. The OCG was dismantled through these joint actions. In this illegal immigration case, Eurojust's specific task was to provide non-binding written counsel regarding which EAW had priority. Factors to consider in such a situation of competing EAWs in each involved Member State are: (a) the number of persons involved; (b) the severity of the crime(s); and (c) whether most of the crimes were committed in one place. The ultimate decision will be taken by the judicial authorities of the executing Member State.



© Shutterstock



© Eurojust

Eurojust is a European Union body established in 2002 to stimulate and improve the coordination of investigations and prosecutions among the competent judicial authorities of Member States when they deal with serious cross-border crime. Each Member State seconds a judge, prosecutor or police officer to Eurojust, which is supported by its administration. In certain circumstances, Eurojust can also assist investigations and prosecutions involving a Member State and a State outside the European Union, or involving a Member State and the Community.

Eurojust supports Member States by:

- *coordinating cross-border investigations and prosecutions in partnership with judges, prosecutors and investigators from Member States, and helping resolve conflicts of jurisdiction;*
- *facilitating the execution of EU legal instruments designed to improve cross-border criminal justice, such as the European Arrest Warrant;*
- *requesting Member States to take certain actions, such as setting up joint investigation teams, or accepting that one is better placed than another to investigate or prosecute; and*
- *exercising certain powers through the national representatives at Eurojust, such as the authorisation of controlled deliveries.*